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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THOMAS A. BAREFOOT, *Petitioner*,

v.

W. J. ESTELLE, JR, DIRECTOR
TEXAS DEPARTMENT OF CORRECTIONS, *Respondent*.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

---

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether the standards applied by the Court of Appeals for granting or denying a stay of execution pending disposition of an appeal by a federal habeas corpus petitioner under sentence of death violated the holdings in *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967); *Carafas* v. *LaVallee*, 391 U.S. 234 (1968); and *Garrison* v. *Patterson*, 391 U.S. 464 (1968).

2. Whether the procedure used by the Court of Appeals in this case, to deny a federal habeas corpus petitioner's statutory right of appeal on a summary disposition of his motion to stay execution of his death sentence, violated the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

3. Whether psychiatric opinions adduced by the state at the punishment stage of the trial, that the probability was certain and absolute that petitioner would commit future acts of violence and would constitute a future danger to society, both in prison and out, so distorted the penalty function of the jury as to deprive petitioner of his rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, where neither of the witnesses had ever seen or examined the petitioner, and their testimony was based solely upon a "hypothetical" question which contained no medical or psychiatric information but was comprised of all the evidence previously heard by the jury at both stages of the trial, embellished with the prosecutor's conclusion drawn from the evidence, hearsay, thought processes of the named petitioner and named witnesses, jury argument, speculation, reputation testimony by prosecutors and law officers, all of which bolstered the state's evidence with the gloss of psychiatric expertise, even though the evidence required no such "expert" interpretation.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, denying petitioner's motion for a stay of execution is not yet reported. *Barefoot* v. *Estelle*, ____ F.2d ____, No. 82-1680, entered on January 20, 1983.

JURISDICTION

The order of the United States Court of Appeals for the Fifth Circuit, denying petitioner's application for a stay of execution of the sentence of death, was entered on January 20, 1983.

On January 24, 1983, this Court, treating petitioner's application for stay of execution as a petition for writ of certiorari before judgment, granted certiorari and stayed the execution and enforcement of petitioner's sentence of death pending the sending down of the judgment of the Court.

The jurisdiction of this Court is based upon 28 U.S.C. Sec. 1257(3).

OTHER ISSUES THAT WOULD HAVE BEEN RAISED ON APPEAL BELOW

1. Whether the Court of Appeals should have remanded this cause to the district court for a plenary hearing on the issue of prosecutorial misconduct based upon the sworn statement of Mrs. Mary Richards that she was frightened and coerced by the prosecutor and his investigator into falsely testifying that the petitioner resembled the man she saw running away from the scene of the murder, when she knew and informed the state at the time that petitioner was not that man.

2. Whether petitioner was denied due process of law and the effective assistance of counsel at the jury selection stage of the trial when his court-appointed attorneys failed to render reasonably effective assistance of counsel at this critical stage of the proceedings, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

3. Whether petitioner was deprived of his rights under the Sixth and Fourteenth Amendments to the Constitution of the United States, where the state's challenges for cause to numerous prospective jurors were considered under more liberal and different standards than were the same or similar challenges made by petitioner, this, in effect, granting the state additional peremptory challenges.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following Federal Statutes and rules, and state statutes (printed herein as appendix to this Brief):

a. 28 United States Code, Section 2253.

b. 28 United States Code, Section 2251.

c. 28 United States Code, Section 1915(a).

d. Rule 22(b), Federal Rules of Appellate Procedure.

e. Rule 8, Federal Rules of Appellate Procedure.

f. Article 37.071, VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE

TRIAL, APPELLATE, AND POST-CONVICTION HISTORY OF THE CASE

1. Thomas A. Barefoot was convicted of capital murder in the 27th Judicial District of Bell County, Texas and sentenced to death on November 21, 1978.

2. The judgment of conviction and death sentence were affirmed by the Court of Criminal Appeals of Texas on March 12, 1980. Petitioner's Motion for Rehearing was denied April 30, 1980. *Barefoot* v. *State*, 596 S.W.2d 875.

3. This Court denied a petition for writ of certiorari June 29, 1981 *Barefoot* v. *Texas*, ____ U.S. ____ (No. 80-5320).

4. An application for writ of habeas corpus was filed in the state court on September 29, 1981 and was denied by the Texas Court of Criminal Appeals on October 7, 1981.

5. On October 9, 1981, an application for writ of habeas corpus was filed in the United States District Court for the Western District of Texas, Waco Division, and that court granted a stay of execution pending consideration of the application.

6. The district court conducted an evidentiary hearing on July 28, 1982, and on November 12, 1982, filed findings of fact and conclusions of law, denying habeas relief. Petitioner filed his notice of appeal on November 24, 1982. The district court granted petitioner's motion for leave to proceed in *forma pauperis* and on December 3, 1982, issued a certificate of probable cause. The stay of execution was vacated on December 8, 1982.

7. On December 20, 1982, the state trial court ordered that petitioner be executed before sunrise on January 25, 1983. Petitioner's Plea to the Jurisdiction based upon the appeal then pending in the court of appeals was denied.

8. A Motion for Stay of Execution was filed in the Court of Criminal Appeals on December 20, 1982. This Motion was denied by the Court on December 21, 1982, but petitioner was not notified of this action until January 7, 1983.

9. On January 14, 1983, a Motion for Stay of Execution was filed in the United States Court of Appeals for the Fifth Circuit. This Motion was summarily denied on January 20, 1983.

10. A Motion for Stay of Execution was filed in this Court on January 21, 1983. The Court treated the Motion as a petition for writ of certiorari, granted certiorari and stayed petitioner's execution pending judgment of the Court.

STATEMENT OF THE CASE

1. The Offense.

Petitioner was convicted of capital murder and sentenced to death for the shooting of Carl Levin, a patrolman for the City of Harker Heights, Texas, on August 7, 1978.

At the guilt stage of the trial the state presented the testimony of six witnesses from New Mexico, regarding petitioner's arrest in Valencia County, New Mexico, on October 29, 1977, for the offenses of criminal sexual penetration of a minor in the first degree and kidnapping, and his escape from the Valencia County jail on January 19, 1978. (R.1113-1142).

On the morning of August 7, 1978, PFC Edwards was driving to Fort Hood when he saw flames coming from the roof of the Silver Spur Club (R.1168-1170). He saw a man near the edge of the Club parking lot who was looking in the direction of the fire. This man ran across the highway (R.1170-1174). Edwards reported the fire and the presence of the man to the Harker Heights police dispatcher. As he was returning to the fire, Edwards again saw the same man. He reported this to officers Carl Levin and Chuck Cox who were at the fire when he got back. He observed what looked like a burning plastic milk jug on the roof of the club (R.1182-1193).

Levin, dressed in a Harker Heights police uniform departed in a marked Harker Heights police car (R.1194-1195).

Edwards identified the petitioner as the man he saw at the scene of the fire on August 7, 1978 (R.1203, 1215-1216).

Michael Thrash, another Fort Hood soldier, was walking to work at 5:35 a.m. on August 7th, when he saw a car with emergency flashers and a spotlight parked at an intersection (R.1219-1231). Thrash saw a man walk from the bushes and up to the police car (R.1228-1231). This man had a conversation with a police officer and then the man took a step forward. There was a shot and Thrash saw fire come from the barrel of a gun (R.1241). The policeman fell to the ground and the man ran away. Thrash obtained assistance after attempting to chase

the man who fired the shot (R.1243-1244). He could not identify the man who did the shooting.

Mary Richards who lived half of a block from the scene of the shooting heard two shots about 5:45 a.m. on August 7, 1978. She looked out and saw a man running down the street. He was big built, kind of muscle bound at the top and slimmed at the waist. He had auburn hair, wavy in the back. He was about five feet five or seven inches tall. The petitioner resembled the man "from the hair and the side." She could not make a positive identification, but petitioner resembled the man she saw running down the street (R.1262-1279).

Donnie Ray Tiller, a cab driver who lived in a trailer with Robert Roberson, Radene Goodlow and Deborah Forbes, in Killeen, Texas, testified that the petitioner, known to the witness as "Darren Callier," began living in the trailer in June, 1978 (R.1396-1404, 1407-1409).

On August 6th, the petitioner told Tiller of a plan to burn or blow up a building to create a diversion while he was robbing the Oasis Club (R.1415-1418). The last time Tiller saw petitioner was about 4:30 p.m. on August 6th (R.1419-1422).

The next morning petitioner called Tiller at work and asked him if he had been listening to the news. When Tiller said that he had, petitioner stated: "Yeah, I shot him. I killed the mother fucker, I shot him in the head . . ." (R.1423-1429).

Another habitue of the trailer, Robert Roberson, testified that at about 4:30 a.m. on August 7th, he drove petitioner to Harker Heights. Petitioner had what appeared to be a small automatic pistol, a home-made bomb and a plastic milk jug. Petitioner said he was going to blow up the Silver Spur Club because Joe told him to do it for the insurance (R.1516-1521, 1527, 1576-1577). Petitioner was driven by Roberson to a convenience store where he bought gas. Roberson left him at another convenience store in Harker Heights and returned to the trailer. Petitioner left the bomb in the car and Roberson disposed of it that afternoon (R.1539, 1575).

Later that morning Roberson was awakened by petitioner who had red splotches on his t-shirt and face. Petitioner said he had "wasted a cop." He changed clothes and left the trailer on foot (R.1532-1538, 1581-1582).

That same morning Francisco Hernandez met petitioner on a street in Killeen and after a brief conversation they went to a grocery store where petitioner bought groceries and then to Hernandez's apartment, where petitioner spent the night (R.1601-1605, 1629-1630).

Hernandez heard a news broadcast on the morning of August 8, which indicated that the police were looking for petitioner. Petitioner admitted that he was the man they were looking for, but he denied that he killed a policeman (R.1606-1614).

Petitioner shaved his mustache and Hernandez gave him a different shirt. They went to Belton where petitioner bought a bus ticket to Houston and Hernandez hitch-hiked to Austin (R.1615-1624, 1635-1637).

Petitioner was arrested when he got off the bus in Houston. The gun that fired the fatal bullet was in his back pocket (R.1676).

2. Evidence at the punishment hearing.

John E. Green, first assistant United States Attorney for the Western District of Oklahoma, in Oklahoma City, handled a case on October 22, 1975, in which petitioner was convicted of the unlawful possession of a sawed-off .410 gauge shotgun, and sentenced to confinement in the federal penitentiary for one year. Petitioner's objection to this evidence, because it did not involve an act of violence, was overruled (R.1663-1666).

Byron Legendre, an assistant district attorney for the Fifteenth Judicial District Court in Lafayette Parish, Louisiana, was the prosecutor in a case where petitioner entered a plea of guilty to two felony counts, distribution of marijuana and possession of amphetamine, on December 2, 1974 (R.1968-1970).

Legendre was present in court on November 26, 1974, when petitioner pled guilty to the misdemeanor offense of possessing marijuana and the offense of carrying a concealed weapon (R.1669-1670).

John Clausen was a police officer in Morgan City, Louisiana, in 1969. At that time he knew the petitioner's general reputation for being a peaceful and law abiding citizen in Morgan City was bad (R.1975-1976).

Louis Belaire was a deputy sheriff in New Iberia, Louisiana, in 1972. At that time, in Iberia Parish, petitioner's reputation for being a peaceful and law abiding citizen was bad (R.1978-1979).

Lieutenant Danny Brown of the Louisiana State Police stationed in Lafayette, Louisiana, asserted that petitioner's reputation was bad in that area in 1973 (R.1980-1983).

Carl Primeaux, probation parole officer for the Louisiana Department of Corrections, broadened the area of petitioner's bad reputation to include both Lafayette and New Iberia, Louisiana, during 1973 to 1975 (R.1984-1986).

Chester Childs, a police officer from Oklahoma City, Oklahoma, testified that petitioner's reputation for being a peaceful and law abiding citizen in Oklahoma City in 1975 was bad (R.1988-1991).

Dorece Green, Executive Director of Permian Place, testified to the same reputation for petitioner in Ector County, Texas, in 1976 (R.1991-1994).

Sheriff A. C. Gaston, from Woodward, Oklahoma, gave identical reputation testimony for the year 1977 (R.1995-1997).

Bob Olive, assistant chief of police in Neodesha, Kansas, gave like answers for petitioner's reputation in his area in 1977 (R.2001-2004).

Thomas Esquibel, district attorney for Sandeval and Valencia Counties, New Mexico, testified that petitioner's reputation in those counties was bad in 1977 and 1978 (R.2004-2007).

James Trost, a clinical psychologist for the New Mexico Health and Environmental Department, in Santa Fe, New Mexico, was in Valencia County on December 6, 1977, in response to a court order to conduct an investigation. He had some "familiarity" with petitioner's reputation for being a peaceful and law abiding citizen and that reputation was bad (R.2008-2009).

Psychiatrists John Holbrook and James Grigson, in answer to what were purportedly hypothetical questions, testified extensively in opposition to the jury's consideration of a life sentence and in support of an affirmative answer to the "future dangerousness" issue.

3. Evidentiary Hearing in the District Court

Following a plenary hearing of the writ, the district court made findings of fact and conclusions of law that were virtually verbatim to those submitted by respondent. The court's findings of fact were not supported by, but were instead contrary to, the evidence adduced at the hearing. The hearing transcript is hereafter referred to by page numbers preceeded by "T."

The court found that petitioner's complaints about the purported hypothetical question propounded to state psychiatrists Grigson and Holbrook were without merit because all of the experts who testified at the habeas hearing agreed not only with the diagnosis that petitioner was a sociopath, but they also unanimously agreed and were 90% sure that he would commit future acts of violence and thus constitute a danger to society. Such findings were unsupported by the evidence.

Psychiatrist Fred Fason disagreed that future dangerousness can be predicted with certainty without extensive examinations (T. 20). He noted that "bad reputation" had no diagnostic significance (T. 23). Although his first impression might be that petitioner was a sociopath, he would perform extensive tests to rule out paranoid personality, schizophrenia, passive-aggressive personality and chromosome disorder, among

others (T. 39). Fason did not agree that the hypothetical question contained sufficient data upon which to make a diagnosis and that a medical practioner doing so would be incompetent, certainly where a man's life is at stake (T. 37).

Psychologist Wendell Dickerson pointed out the high error rate in predicting future dangerousness, two out of three predictions being wrong, saying "clinicans do significantly overpredict" (T. 97-98). In his opinion, psychiatric diagnosis does not accurately predict behavior and future conduct with a high degree of accuracy (T. 105). Dickerson declined to diagnose petitioner's mental condition from the hypothetical *data*, but treating the information as a medical school exercise, his first guess would be that he was sociopathic (T. 116).

Respondent's psychologist, Dr. George Parker, did agree with Grigson's analysis of the hypothetical *data*, although even he conceded that he was not 100% sure of anything (T. 190). He knew of no scientific studies of sociopaths that confirmed the accuracy of predictions of future dangerousness (T. 200). Listing seven or eight factors he would consider in diagnosing a sociopath, Parker claimed that *he needed only to know that petitioner committed murder and had the criminal history listed in the hypothetical question, to make his diagnosis* (T. 212).

Parker agreed with petitioner that a jury might be misled by an expert's prediction of future dangerousness with 100% certainty, and that the defendant on trial is an untreatable sociopath, and a danger in the penitentiary, if sentenced to life (T. 217, 220). He agreed that this information would mislead any jury naive as to believe that anything is 100% accurately predictable (T. 221).

Respondent's psychiatrist, Richard Coons, believed that adequate data was presented in the hypothetical questions for a reliable expert opinion that petitioner was a sociopath, but agreed that with more information, the diagnosis could be confirmed (T. 231, 242). He said [contrary to Grigson's assertion] that sociopathic behavior declines after the age of 40 (T. 244).

SUMMARY OF THE ARGUMENT

Where a federal district court, although denying a petition for writ of habeas corpus by a person in state custody, issues a certificate of probable cause and grants leave for the petitioner to appeal in forma pauperis, the court of appeals must accord him the same procedural rights as any other appellant. *Coopedge* v. *United States*, 369 U.S. 438 (1962). This includes the right to a disposition of the appeal in accord with the circuit court's ordinary procedure. *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967).

Summary treatment of a habeas appeal by the court of appeals is authorized if that court's order affirmatively shows that the appeal was duly considered on its merits and that, despite the issuance of the certificate of probable cause, the appeal is *frivolous*. *Carafas* v. *LaVallee*, 391 U.S. 234, 242 (1968).

"Where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and . . . if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be limited." *Garrison* v. *Patterson*, 391 U.S. 464, 466-467 (1968).

The general rules applicable to consideration of a habeas appellant's motion to stay the execution of his death sentence are: (1) once the district court grants a certificate of probable cause, the appellant has an absolute right to appeal the final order of that court. A review on the merits is required; (2) review is mandated where the petitioner's application for habeas relief is his first assertion of most of his constitutional arguments in federal court, and the issues raised are not frivolous; (3) even though state-court findings properly made are presumptively correct, the court of appeals is required to consider every legal challenge made pursuant to federal constitutional law; and (4) when a responsible review of the district court proceedings cannot be made and the merits cannot be satisfactorily considered prior to execution of a scheduled

death sentence, a stay should be granted. *Foquette* v. *Bernard*, 198 F.2d 96 (9th Cir. 1952): *United States ex rel. Goins* v. *Sigler*, 250 F.2d 128 (5th Cir. 1957); *Shaw* v. *Martin*, 613 F.2d 487 (4th Cir. 1980); *Dobbert* v. *Strickland*, 670 F.2d 938 (11th Cir. 1982).

The standards imposed by the Court of Appeals for the Fifth Circuit in the instant case disregarded the above authorities under the guise of its authority under Rule 8, Fed. R. App. P. to disregard the requirements of 28 U.S.C. Sections 1915(a), 2251, 2253, and Rule 22(b), Fed. R. App. P.

Instead of subjecting the issues raised by petitioner to either the "frivolous" or "substantial showing of the denial of a federal right" test, the Court required a threshold showing of the "likelihood of success" used in stays of civil injunctions and judgments.

None of the prior cases from the Court informed petitioner that the proceedings on his stay application would also involve consideration of the entire case on the merits. The cases cited by the Court of Appeals to support the stringent standards here imposed specifically hold that the stay application will be considered without regard to the merits of the case.

There is no Local Rule by the Fifth Circuit authorizing such summary treatment or serving as notice to habeas petitioners that such may be their fate.

The issues raised by petitioner are substantial. They are supported by a growing authority from the psychiatric community, and by the American Psychiatric Association, whose counsel authorized petitioner to inform the circuit court that the Association would file an *amicus curiae* brief in this cause.

There is also respected legal authority supporting petitioner's claims. *White* v. *Estelle*, ____ F. Supp. ____, [No. H-81-1661] (S.D.Tx. decided December 30, 1982). See *People* v. *Murtishaw*, 631 P.2d 446 (Sup.Ca. 1982).

ARGUMENT

1. Standards Of Summary Appellate Review On Habeas Corpus Motion To Stay Execution Of Death Sentence.,

The United States District Court, after an evidentiary hearing and examination of the trial record denied habeas relief to the petitioner, a state prisoner who was scheduled to be executed before sunrise on January 25, 1983, dissolved a previously granted stay of execution, granted leave to proceed in *forma pauperis*, and issued a certificate of probable cause.

Petitioner filed a motion for stay of execution in the Court of Appeals on Friday, January 14, 1983. At approximately 3:00 p.m. on Monday, January 17, the Court scheduled oral argument on the application for Wednesday, January 19, at 9:00 a.m. Counsel was "requested to present argument on questions raised if the Court of Appeals refused to stay execution, when the consequence in death during the pendency of an appeal in process. See *Brooks* v. *Estelle*, 51 Law Week 3469 (December 6, 1982). [Counsel was] also permitted to present any matter considered germane to the grant or denial of a stay and the consequences of that decision."

At 1:00 p.m. on Thursday, January 20, the Court of Appeals issued a 16-page opinion denying a stay of execution.

The test under which the Court of Appeals gauged the Application was a consideration of the "likelihood of success of [the] appeal" and the requirement that "[t]here should be a substantial case on the merits of any serious legal question involved in the appeal to warrant staying the decision below," citing *Ruiz* v. *Estelle*, 666 F.2d 854, 857 (5th Cir. 1982).

The impediments raised by the certificate of probable cause were brushed aside under the purported authority of Rule 8, Fed. R. App. P., which "clearly contemplates that it is the appellate court's responsibility to decide the merits of [a stay of execution of a death sentence in the appeal from an adverse habeas corpus proceeding in the district court]."

A review of the authorities exposes the fallacy of this conclusion.

Coopedge v. *United States*, 369 U.S. 438 (1962), established the standards to be applied by the lower federal courts in ruling on motions to appeal in *forma pauperis*. The "good faith" requirement of 28 U.S.C. Sec. 1915(a) is met when "it is apparent that the applicant will present issues for review not clearly frivolous." 369 U.S. at 446.

While *Coopedge* specifically addressed the statutory right of an indigent federal defendant to appeal his conviction, it also articulated the proposition that the Courts of Appeals must accord all putative appellants "the same procedural rights."

Only if the Court of Appeals screened the paid appeals on its docket for frivolity, without hearing oral argument, reviewing a record of the trial proceedings or considering full briefs, could it impose the same rules in indigent cases.

"But, if [it was the Court's practice] to defer rulings on motions to dismiss paid appeals until the court has had the benefit of hearing argument and considering briefs and an adequate record, we hold it must no less accord the poor person the same procedural rights." *Coopedge* v. *United States*, Id. at 447-448; *Ellis* v. *United States*, 356 U.S. 674, 675, (1958).

Determination by either the district or circuit court that a habeas petitioner may appeal in *forma pauperis* does not assure his right to an appeal. He must also obtain a certificate of probable cause as required by 28 U.S.C., Sec. 2253. The procedure is governed by Rule 22(b), Fed. R. App. P., which provides that "the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and the file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge."

In *Nowakowski* v. *Maroney*, 386 U.S. 542, 543 (1967), this Court held that the Court of Appeals erred in summarily denying a habeas petitioner's application to proceed in forma

pauperis after the district judge has issued a certificate of probable cause pursuant to U.S.C. Sec. 2253, saying that "when a district judge grants [a certificate of probable cause], the court of appeals must grant an appeal in *forma pauperis* (assuming the requisite showing of poverty) and proceed to a disposition of the appeal in accord with its ordinary procedure."

In *Stewart* v. *Beto*, 454 F.2d 268 (5th Cir. 1971), *cert. denied*, 406 U.S. 925 (1972), the court refused to rule on an application for a certificate of probable cause in the first instance, where there had been no ruling by the district judge, concluding that the operation of U.S.C. Sec. 2253, and the procedures required by Rule 22(b), Fed. R. App. P. obliged the district judge who heard the habeas petition to act on the motion for the certificate. The appellate court has jurisdiction of the appeal if the district judge grants the certificate. If the motion is denied, the judge must state the reasons for the denial. Then the Court said, at page 269:

> "It would be proper for this court to grant the certificate under Rule 22(b). However, a denial of the certificate by this court would foreclose appellant from his first level right to a ruling by the district judge.
>
> "This right is one of substance as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance. See *Nowakowski* v. *Maroney*, 1967, 386 U.S. 542 . . . Under Sec. 2253, a district judge, in his sole discretion, may permit an appeal if probable cause to appeal is found."

See *Clements* v. *Wainwright*, 648 F.2d 979 (5th Cir. 1981), where the court again refused to rule on an application for probable cause and remanded the case for a ruling by the district judge.

The court refused to treat the district court's order granting leave to appeal in *forma pauperis* as the equivalent of a certificate of probable cause. This holding was required because "[t]he test for granting a certificate of probable cause is stricter" than that for leave to proceed in *forma pauperis*.

The court cited with approval the statement by Justice (then Judge) Blackmun that: "My own reaction is that the cases [of the several circuits], taken as a whole, do indicate that the standard of probable cause requires something more than the absence of frivolity and that the standard is a higher one than the "good faith" requirement of Sec. 1915." Blackmun, *Allowance of In Forma Pauperis Appeals in Sec. 2255 and Habeas Corpus Cases*, 8th Cir. 43 F.R.D. 343, 352 (1967). See *Payne* v. *United States*, 539 F.2d 443 (5th Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

The Fifth Circuit has equated "probable cause" to a "substantial showing of the denial of [a] federal right." *Harris* v. *Ellis*, 204 F.2d 685, 686 (5th Cir. 1953); *Stewart* v. *Beto*, 454 F.2d at 270, n. 2; cf., *Dillingham* v. *Wainwright*, 422 F. Supp. 259 (S.D.Fla. 1976), affirmed 555 F.2d 1389 (5th Cir. 1977).

Variations of this standard have been pronounced by the several circuits. See, e.g., *Ramsey* v. *Hand*, 309 F.2d 947, 948 (10th Cir. 1962) ("substantial question"); *Bowlen* v. *Scafati*, 395 F.2d 692, 693 (1st Cir. 1968) ("possible merit"); *Garnder* v. *Pogue*, 558 F.2d 548 (9th Cir. 1977); *Poe* v. *Gladden*, 287 F.2d 249, 251 (9th Cir. 1961) ("not plainly frivolous"); *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982) (substantial issues); *Beller* v. *Clausen*, 484 F. Supp. 217 (E.D.Wis. 1980) ("substantial questions"); *Gordon* v. *Secretary of State of Wisconsin*, 462 F. Supp. 307 (E.D.Wis. 1978) ("substantial question"); see *Alexander* v. *Harris*, 595 F.2d 87, 91 (2nd Cir. 1979) and the detailed analysis of the variations used by the several circuits, and that Court's determination that probable cause is shown "if [the petition] is not frivolous and . . . presents some question deserving appellate review." See generally, Hunter, *Post Conviction Remedies*, 50 F.R.D. 153, 176 (1971); Blackmun, *Allowance Of In Forma Pauperis Appeals In Section 2255 And Habeas Corpus Cases*, 43 F.R.D. 343, 351-354 (1967).

In *Carafas* v. *LaVallee*, 391 U.S. 234 (1968), the district court dismissed a petition for writ of habeas corpus but issued a

certificate of probable cause and ordered that the notice of appeal be filed without prepayment. Notice of appeal was filed and the petitioner applied to the circuit court for leave to proceed in *forma pauperis*. The State opposed this latter motion and moved to dismiss the appeal on the ground that it was without merit.

The court of appeals denied the Application for Leave to Proceed in Forma Pauperis and granted the State's motion to dismiss the appeal. *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967), was decided after the circuit court's ruling but before *Carafas* was concluded.

This Court reaffirmed the *Nowakowski* rule that "when a district judge grants . . . a certificate of probable cause, the court of appeals must grant an appeal in *forma pauperis* . . . and proceed to a disposition of the appeal in accord with its ordinary procedures." *Carafas* v. *LaValle*, 391 U.S. at 241.

The State argued that the circuit court's rulings were proper because the entire district court record was available to it and because the motion to dismiss and the petitioner's reply contained some argument on the merits.

Rejecting this argument, the Court said, at page 242:

> "Nothing in the order entered by the Court of Appeals . . . indicates that the appeal was duly considered on its merits as Nowakowski requires in cases where a certificate of probable cause has been granted. Although Nowakowski does not necessarily require that the Court of Appeals give the parties full opportunity to submit briefs and argument in an appeal which, despite the issuance of the certificate of probable cause, is *frivolous*, enough must appear to demonstrate the basis for the court's summary action. Anything less than this, as we held in Nowakowski, would negate the office of the certificate of probable cause."

In *Garrison* v. *Patterson*, 391 U.S. 464 (1968), after the district court denied a death-sentenced state prisoner's petition for writ of habeas corpus, and refused to issue a certificate of probable cause to appeal, the petitioner filed a three-page

document in the Court of Appeals, requesting a stay of execution, a certificate of probable cause to appeal, and leave to proceed in *forma pauperis*. The pleadings merely stated the chronological history of the case, and specified one of the issues alleged as requiring further hearing by the appellate court.

The next day counsel were heard orally by a panel of the Court of Appeals, and nine days later, without further argument or submissions by counsel, the Court issued an order granting the certificate of probable cause and affirming the district court's denial of habeas relief.

This Court noted that the principle underlying the holding in *Nowakowski* v. *Maroney*, *supra*, "was that if an appellant persuades an appropriate tribunal that probable cause for an appeal exists, he must then be afforded an opportunity to address the underlying merits. This principle is no less applicable when a court of appeals, having received submissions relating only to probable cause and other procedural matters, decides that probable cause indeed exists." 391 U.S. at 546.

The Court cited *Carafas* v. *LaVallee*, 391 U.S. 234, at 242, as authority for the qualification that *Nowakowski* "does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of such cases."

The Court in *Garrison* v. *Patterson*, 391 U.S. at 466-467, added the following caveat:

> "Carafas requires the courts of appeals to give sufficient indication that an appeal has been disposed of on the merits, but nothing in Nowakowski and nothing we say here prevents the courts of appeals from considering the questions of probable cause and the merits together, and nothing said there or here necessarily requires full briefing and oral argument in every instance in which a certificate is granted. *We hold only that where an appeal possesses sufficient merit to warrant a certificate, the appellant must be afforded adequate opportunity to address the merits, and that if a summary procedure is adopted the appellant must be informed, by rule or otherwise, that his opportunity will or may be [467] limited.* Within this

> general framework, the promulgation of specific procedures is a matter for the courts of appeals. [emphasis added]

Even though the respondent in *Garrison* argued that petitioner was given all the time he wanted for oral argument, the Court noted that he "was unable, however, to point to any rule or decision *forewarning* an applicant for a certificate of probable cause to make his argument on the underlying issues.

In *Fouquette* v. *Bernard*, 198 F.2d 96, 97-98 (9th Cir. 1952) where a death-sentenced state prisoner sought a stay of execution after the district court denied his petition for writ of habeas corpus and issued a certificate of probable cause, Chief Judge Denman, sitting alone, found that the record presented a substantial question for consideration on appeal. He also noted that "[o]bviously, if there is probable cause for the appeal it would be a mockery of federal justice to execute Fouquette pending its consideration."

Foquette was followed in *United States ex rel. Goins* v. *Sigler*, 250 F.2d 128, 129 (5th Cir. 1957). There the district court denied a petition for writ of habeas corpus by a death-sentenced state prisoner but granted a certificate of probable cause. The court said: "For that appeal to be effective it is obvious that it would be necessary to stay the execution of the appellant pending the appeal."

An application to stay execution of a death sentence by a state prisoner was heard and granted by Circuit Judge Phillips in *Shaw* v. *Martin*, 613 F.2d 487 (4th Cir. 1980). It does not appear that the district judge issued a certificate of probable cause before the stay application was presented to and considered by Judge Phillips.

At the outset, Judge Phillips noted, at page 490:

> "There is no developed body of precedent to guide the decision to grant or deny a stay of imminent execution of a death sentence. The wholly unique situation presents a

wholly unique problem in the administration of criminal justice.

". . .

"In the final analysis, there is required a practical judgment whether in the particular situation 'the legal issues have been sufficiently litigated and relitigated that the law must be allowed to run its course'; and whether the criminal defendant's entitlement to 'all the protections . . . which surround him under our system prior to conviction and during trial and *appellate review* [emphasis mine] have been accorded."

Judge Phillips felt that "even with respect to issues pending for first instance resolution, it may be appropriate to require a facial showing of substance to justify a stay." He concluded, however, that "the inquiry into substance properly stops with identification of the nature of the issue, and with consideration as to whether it has already been fairly litigated on the merits under procedures designed for the purpose. In the very nature of proceedings on a motion for a stay of execution, the limited record coupled with the time constraints imposed by the imminence of execution preclude any fine-tuned inquiry into the actual merits." Id. at 491-492.

The reasoning in the *Shaw* case was followed in *Dobbert* v. *Strickland*, 670 F.2d 938 (11th Cir. 1982). The motions for stays of execution in both cases were brought purusant to 28 U.S.C. Sec. 2251, and without regard to the novel concept that Rule 8, Fed. R. App. P. governed consideration of the motions.

In *Dobbert*, the district court issued a certificate of probable cause but denied a say of execution. The Court said, "Under the issuance of the certificate, the petitioner had an absolue right to appeal the final order of the district court to this Court. A review on the merits is required." Id. at 939.

The Court inferentially found that one of the issues presented by Dobbert, present in several similar habeas appeals in which the sentences of execution have been stayed, was a

substantial one, but other major considerations in granting the stay were:

> "It was apparent to the Court that a responsible review of the district court proceedings could not be accomplished prior to the scheduled time for execution of sentence. Petitioner's application for a writ of habeas corpus is his first assertion of most of his constitutional arguments in federal court. Although state-court findings properly made are presumed correct by the federal court in a section 2254 action . . . this Court is required to consider every legal challenge made pursuant to federal constitutional law. *Napue* v. *Illinois*, 360 U.S. 264 (1959).
>
> ". . .
>
> "When the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, as in this instance, a stay should be granted.

Dobbert and *Goode*, as well as Judge Phillips' ruling in *Shaw* all demonstrate a grasp of the standards approved by this Court for use by the lower federal courts in considering motions to stay execution of a scheduled death sentence. Each recognized that (1) once the district court grants a certificate of probable cause, a habeas petitioner has an absolute right to appeal the final order of that court. A review on the merits is required; (2) review is mandated where the petitioner's application for a writ of habeas corpus is his first assertion of most of his constitutional arguments in federal court, and the issues raised are not frivolous; (3) even though state-court findings properly made are presumptively correct, the court of appeals is required to consider every legal challenge made pursuant to federal constitutional law; and (4) when a responsible review of the district court proceedings cannot be made and the merits cannot be satisfactorily considered prior to execution of a scheduled death sentence, a stay should be granted.

The scholarly analysis by Judge Murphy of a district judge's duty in considering issuance of a certificate of probable cause after denying habeas relief to a person in state custody, in *Gordon* v. *Willis*, 516 F. Supp. 911 (N.D.Ga. 1980), lucidly sets out standards that are equally appropriate for consideration by

the court of appeal in ruling on the same petitioner's application to stay the execution of his death sentence.

First, doubts about whether to grant the certificate should be resolved in favor of the petitioner. *Jones* v. *Warden, Louisiana State Penitentiary*, 402 F.2d 776 (5th Cir. 1968).

Second, the Congressional purpose in enacting Section 2253 was to "eliminate the abuse of the writ of habeas corpus in the federal courts by undue interference with state processes incident to protracted appellate proceedings in *frivolous* cases. *United States ex rel. Winfield* v. *Cascles*, 403 F. Supp. 956 (E.D.N.Y. 1975).

Third, "Even a 'weak' argument, one which may be 'well beyond the law's existing frontier but well within the frontier of rationality' is properly certified.

Fourth, "if there was considerable law supporting petitioner's argument, but stronger authority for the position of the respondent, then the certificate should be granted."

Fifth, "In requiring a 'question of some substance', or a 'substantial showing of the denial of [a] federal right', obviously the petitioner need not show that he should prevail on the merits. He has already failed in that endeavor. Rather, he must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues other than how this Court has; or that the questions are 'adequate to deserve encouragement to proceed further.' " *United States ex rel. Jones* v. *Richmond*, 245 F.2d 234 (2nd Cir. 1957), *cert. denied*, 355 U.S. 846 (1957).

The following additional principles may be gleaned from the authorities cited above:

1. The Courts of Appeals must accord all putative appellants "the same procedural rights." *Coopedge* v. *United States*, 396 U.S. 438 (1962);

2. When a district judge grants a certificate of probable cause to appeal, the court of appeals must grant an appeal in

forma pauperis (assuming the requisite showing of poverty) and proceed to a disposition of the appeal in accord with its ordinary procedure. *Nowakowski* v. *Maroney*, 386 U.S. 542 (1967);

3. The right to a ruling by the district judge on the motion for certificate of probable cause is one of substance "as will be seen from the fact that Congress has vested absolute power in the district courts to allow habeas appeals by granting the certificate in the first instance." *Stewart* v. *Beto*, 454 F.2d 268 (5th Cir. 1971).

4. Any summary dismissal order by the court of appeals after the district judge has granted a certificate of probable cause must affirmatively show that the appeal was considered on its merits as required by *Nowakowski*, *Carafas* v. *LaVallee*, 391 U.S. 234 (1968).

5. Even though a certificate of probable cause has been issued, *Nowakowski* does not require full briefing and argument if the appeal if *frivolous*, but enough must appear to demonstrate the basis for the court's summary action. Ibid.

6. *Nowakowski* does not prevent the courts of appeals from adopting appropriate summary procedures for final disposition of appeals which, despite the issuance of the certificate of probable cause, are *frivolous*, but the petitioner must be given an opportunity to address the merits, and he must be informed, by rule or otherwise if summary procedures are to be used. *Garrison* v. *Patterson*, supra.

2. Standards Of Review Imposed In The Fifth Circuit.

The Court of Appeals for the Fifth Circuit has recently considered two other Texas death penalty cases in which the petitioner sought a stay of execution of his death sentence.

In *O'Bryan* v. *Estelle*, 691 F.2d 706 (5th Cir. 1982), the district court denied habeas relief, refused to stay the petitioner's execution and rejected his motion for a certificate of probable cause.

His application to the Court of Appeals for a stay of execution and certificate of probable cause were granted, but the Court applied the stringent rules applicable to non-habeas civil stays of exeuction of judgment and stays of injunctions pending appeal.

They considered (1) whether the movant has made a showing of likelihood of success on the merits, (2) whether the movant has made a showing of irreparable injury if the stay is not granted, (3) whether the granting of the stay would serve the public interest."

These rigid standards were tempered by a habeas petitioner's right of appeal as stated in *Goode* v. *Wainwright*, 670 F.2d 941 (11th Cir. 1982): "A defendant 'is given the right to seek review in the federal courts of claims based upon our national Constitution and arising from his State court conviction. If he is denied relief in the federal district court then the law gives him the right to appeal.' " *O'Bryan* v. *Estelle*, 691 F.2d at 708.

After thus departing from the previous standards imposed by statute and rule governing the appeal of habeas cases, the court specifically found "that at least one of Petitioner's claims presents a substantial question and because we cannot possibly give adequate review to his claims in the few days remaining before his scheduled execution, we must grant the stay in order to protect the Petitioner's right to appeal the district court's denial of habeas corpus relief." Id. at 708.

It is not clear from the opinion whether or not the Court based the stay upon the "substantial question" standard.

While the "non-frivolous" standard imposed upon a *forma pauperis* appeal may, in practical effect, be equated with the "substantial federal issue" standard necessary for a certificate of probable cause, neither of these concepts is equivalent to a showing of a "likelihood of success on the merits."

The second case was *Brooks* v. *Estelle*, ____ F.2d ____, [Slip Opinion, Cause No. 82-1613] (5th Cir. 1982), where the court, without citing or referring to *O'Bryan*, denied a stay of execu-

tion on the ground that "there was no substantial question concerning the correctness of the district court's judgment." Slip Op. p. 3.

The Court also refused to stay Brooks' execution, the majority relying upon the opinion by the Court of Appeals that there were no remaining arguments or contentions of substance that would benefit from further briefing and oral argument, ie., essentially that the issues were both frivolous and had been previously presented to and denied by the court. *Brooks* v. *Estelle*, ___ U.S. ___, [No. A-504] (1982). Summary action was appropriate under those circumstances even though the district court has issued a certificate of probable cause.

The court of appeals affirmatively demonstrated that Brooks' claims had been considered on the merits, that none of them presented a substantial issue, and, by inference, were frivolous.

The due process standards inherent in *Coopedge* and *Garrison* were apparently disregarded in *Brooks*. The petitioner was not accorded "the same procedural rights," including the statutory right of appeal, given all putative appellants. The court of appeals had not previously established, by rule or otherwise, that a petitioner's opportunity to address the merits of his appeal would be limited and would receive summary treatment.

The only fifth circuit authority at the time the *Brooks* motion for stay was summarily denied was *O'Bryan* v. *Estelle*, supra, and there the court granted a certificate of probable cause and a stay of execution and set the case for accelerated review on the merits.

At no time prior to the *O'Bryan* decision had the court ever indicated that the standards of Rule 8, Fed. R. App. P. would apply to the summary review of a motion to stay the execution of a death sentence. It is doubtful that those standards were used in *O'Bryan*, it appearing that the court's decision was based upon the "substantial issue" rule alone.

In the instant case, the court of appeals, in an effort to meet the minimum due process requirements of *Garrison*, held that the rigid *O'Bryan* standards were authorized by Rule 8, Fed. R. App. P., neatly overruling the district court's primary authority to grant an appeal in habeas cases and ignoring the rulings of this Court that such summary treatment is restricted to *frivolous* appeals.

Thus, at the time the court of appeals denied the motion to stay the execution of the death sentence in this case, after the district court granted a certificate of probable cause, the petitioner had no prior notice, by rule or otherwise, that his stay motion would be judged under the provisions of Rule 8, or that, in the summary procedure adopted by the court of appeals in his case, his opportunity to address the merits of his appeal would be limited.

Even if it be conceded, *arguendo*, that the Rule 8 standards are applicable to habeas review, the court of appeals had no opportunity to adequately review the merits in this cause.

This is not an eleventh-hour motion for stay by design. A fourteen day delay in presenting the stay application was occasioned by the failure of the Court of Criminal Appeals to notify petitioner that his first motion for stay of execution had been summarily denied by that court.

The application was filed in the court of appeals on Friday, January 14, 1983. At approximately 3:00 p.m. on Monday, January 17, the court scheduled oral argument on the application for 9:00 a.m. on Wednesday, January 19. Nothing in the court's notification informed the petitioner that the court was contemplating summary review of the merits of his appeal. Consequently petitioner was never afforded an opportunity to brief and address the merits except as they bore upon the stay proceeding. In addition, the severe time limitations effectively eliminated any possibility of such detailed submission by the petitioner, and the proceedings effectively denied petitioner any meaningful appeal on the merits.

Just as in *O'Bryan*, the court of appeals stated that "[u]pon the question of whether to stay an execution until the appeal has been processed, we consider the likelihood of success of that appeal." The court again cited *Ruiz* v. *Estelle*, 650 F.2d 555 (5th Cir. 1982) as authority. *Barefoot* v. *Estelle*, ___ F.2d ___, Slip Op. p. 2318. (5th Cir. 1983).

In *Ruiz*, the issue before the court was the motion of the respondent-appellant, director of the department of corrections to stay portions of the district court's injunction against certain practices and conditions existing in the Texas corrections system.

The court specifically noted that under Rule 8, "we do not decide the merits of the State's appeal from the lower court's injunction; intead, we consider only whether the district court's injunction should be stayed pending appeal." *Ruiz* v. *Estelle*, 650 F.2d at 565.

Obviously there is no statutory authority for a district court, in granting an injunction, to authorize an appeal on the merits.

All of the cases cited in *Ruiz* emphasize that the court will not decide the merits of the appeal; that the only issue before the court was whether the district court's judgment or injunction should be stayed pending appeal. There is thus nothing in *Ruiz* or the cases upon which it is based to put petitioner on notice that the merits of his appeal would be reached on the stay proceedings.

The test imposed by the court of appeals under Rule 8 and in violation of 28 U.S.C. Sec. 2251, requiring petitioner to show a likelihood of success of the appeal, goes far beyind the nonfrivolous standard imposed by this Court in habeas appeals where a certificate has been granted by the district court.

It was physically impossible for the members of the panel below to have made any "fine-tuned inquiry into the actual merits" of petitioner's case. No panelist had ever seen the 260 page habeas record and the 1400 page trial record until after oral arguments had been concluded. No substantive evaluation

of petitioner's claims was possible "under the time constraints imposed by the imminence of [petitioner's execution]."

The court below has extended its recent decisions in *Brooks* v. *Estelle*, supra, and *O'Bryan* v. *Estelle*, supra, to hold that constitutional issues of first impression which are manifestly not frivolous may nonetheless be summarily rejected, without prior notice by rule, decision or order, upon an application to stay the execution of a death sentence.

The Court erroneously utilized Rule 8, Fed. R. App. P., to circumvent the statutory provisions of 28 U.S.C. Section 2251.

Petitioner contended that the "hypothetical" testimony of Grigson and Holbrook predicting his absolutely certain, 100% future dangerousness, even to the inmates and personnel of the Texas Department of Corrections if given a life sentence, based solely upon a "hypothetical" question, violated his Sixth, Eighth and Fourteenth Amendments rights.

An abundance of legal and psychiatric literature, summarized for this Court by the American Psychiatric Association in Point I of its *amicus* brief filed in *Estelle* v. *Smith*, (No. 79-1127) support petitioner's position. A copy of that point of the *amicus* brief was annexed as appendix B to petitioner's original motion for stay of execution before this Court. The American Psychiatric Association itself supports that position, as both the *Smith amicus* brief and the Draft Report of the Association's Task Force on the Role of Psychiatry in the Sentencing Process (Exhibit G to petitioner's stay application below). Counsel for the Association authorized petitioner to inform the court below that the Association intended to file an *amicus curiae* brief on petitioner's appeal.

There are recent legal opinions supporting petitioner's position, specifically *People* v. *Murtishaw*, 631 P.2d 446 (Sup. Ca. 1982); and *White* v. *Estelle*, ___ F.Supp ___ [No. H-81-1661] (S.D.Tx. 1982). The respondent argued in *White* that he should be granted a new trial because that decision was in conflict with the ruling in *Barefoot* v. *Estelle*.

The authorities and principles detailed in part two of this brief, are sufficient to show that petitioner's claim was not frivolous. It involved substantial issues going to the very heart of the Texas punishment procedure. Any doubts on this score should be resolved in the petitioner's favor. *Gordon* v. *Willis*, supra.

The issues raised by petitioner were substantial. Another federal district court had just reached a contrary result in a similar case relating to the unreliability of hypothetical psychiatric testimony at the punishment phase of a capital trial. *White* v. *Estelle*, supra; *Goode* v. *Wainwright*, supra; *Dobbert* v. *Strickland*, supra.

Even if petitioner's claim was "weak" and "well beyond the law's existing frontier" it was "well within the frontier of rationality" and thus justified in-depth consideration. Every case of first impression begins in just such a posture.

Even if there is law supporting petitioner's position, but stronger authority for respondent's position, a substantial issue is raised, the appeal is not frivolous and the indigent petitioner is entitled to the same procedural rights available to other appellants. *Coopedge* v. *United States*, supra; *Gordon* v. *Willis*, supra.

The procedures followed by the 11th Circuit, along with the considerations detailed by Judge Murphy in *Gordon* v. *Willis*, are appropriate, reasonable and just to both parties. Anything less deprives a death-sentenced habeas petitioner of all semblance of due process and equal protection of the law.

SUMMARY OF ARGUMENT ON THE HYPOTHETICAL QUESTION

Expert psychiatric predictions of future dangerousness are unreliable and prejudicial to a capital defendant. A hypothetical opinion not based on facts within the area of expertise of the witness is inadmissible and incompetent evidence. The "hypothetical" person was indistinguishable from Thomas A. Barefoot. An outrageous diagnosis made, without medical

evaluation or personal or familial history of Barefoot, that he was a sociopath of the most severe type, was untreatable, and would 100% certainly and absolutely commit future acts of violence that would constitute a continuing threat to society, was devastating to efforts to be sentenced to life rather than death.

Texas is the only state of the thirty-seven authorizing the death penalty that fails to specifically require the sentencing authority to weigh aggravating against mitigating circumstances in determining punishment. The absence of guidance in considering any factors warranting leniency, coupled with medical experts asserting that the "hypothetical" defendant on trial is without question dangerous and will kill many others unless executed, goes to the very heart of the discretionary sentencing process. There is no room in the criminal sociopath category for considering any facts in mitigation. What matters the age of the defendant, whether he acted under the influence of intoxicating substances, the domination of another, extreme mental or emotional duress or believed in some justification for his conduct? Even if these facts be true, an expert opinion that his anti-social condition is untreatable and he is without doubt a future danger to all other humans, misleads a jury into believing he must die.

The sentencing process of a capital trial must satisfy requirements of the Due Process Clause. A constitutional death penalty must serve both goals of measured, consistent application and fairness to the accused. The sentencing hearing for Barefoot failed to satisfy Due Process, deprived him of effective assistance of his counsel, and removed all discretion from the jury violating the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution requiring Barefoot's death sentence be vacated.

The Hypothetical Question

Central to the Texas capital sentencing procedure is the second of the two special issues normally submitted to the jury at the separate punishment phase of the trial. The jury must

determine beyond a reasonable doubt "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Article 37.071, Vernon's Ann.Code of Criminal Procedure.

This Court upheld the validity of the Texas capital punishment scheme in *Jurek* v. *Texas*, 428 U.S. 262 (1976), citing with approval the following language from *Jurek* v. *State*, 522 S.W.2d 934, 940 (Tex.Cr.App. 1975):

> "In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could further look to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure, something less, perhaps than insanity, but more than the emotions of the average man, however inflamed, could withstand." 428 U.S. at 272-273.

Although any matter deemed relevant to sentencing by the individual trial judges is admissible, the Texas courts do not instruct the jury to consider any mitigating circumstances or to weigh the mitigating evidence against the aggravating factors in determining its answers to the punishment issues.

Psychiatric testimony has been deemed relevant to sentencing by the Texas courts, and it has been used primarily by the State to support affirmative answers to the future dangerousness issue. See, eg., *Granviel* v. *State*, 552 S.W.2d 107 (Tex.Cr.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Granviel* v. *Estelle*, 655 F.2d 673 (5th Cir. 1981), reversed on other grounds.

The first limitation placed upon such testimony was imposed by this Court in *Estelle* v. *Smith*, 451 U.S. 454 (1981), where the Court curbed the use of psychiatric testimony obtained by the State's expert witnesses, often the same two psychiatrists involved in both *Smith* and this case, obtained in violation of a defendant's Fifth and Sixth Amendment rights. Since that

time, the Court of Criminal Appeals of Texas has rejected psychiatric testimony, again by Grigson, that was not based on sufficient relevant facts within the personal knowledge of the psychiatrist or assumed from common or judicial knowledge or established by evidence, holding that such "opinion is without value and is inadmissible, if based upon facts and circumstances gleaned by [the witness] from ex-parte statements of third persons, and not established by legal evidence before a jury trying the ultimate issue to which the opinion relates." *Holloway* v. *State*, 613 S.W.2d 497 (Tex.Cr.App. 1981), citing *Reed* v. *Barlow*, 157 S.W.2d 933 (Tex.Civ.App. San Antonio, 1941) *writ ref'd.*

A. The Dangerousness Issue In Other Jurisdictions

Of the thirty-seven states that authorize the death penalty, only five—Texas, Virginia, Oklahoma, Idaho and Washington—include the prediction of future dangerousness as a factor to be considered by the sentencer.

The Maryland statute has, as a mitigating circumstance, the *unlikelihood* that the defendant would engage in further criminal activities that would constitute a continuing threat to society. Article 27, § 413(g), Md. Crimes and Offenses.

Virginia requires a specific finding of future dangerousness before death can be *recommended*. The jury is instructed that circumstances to be considered in mitigation are not limited to those enumerated in the statute. The jury apparently can reject death after weighing mitigating and aggravating circumstances, but no mitigating factors are either enumerated or defined. Va. Code § 19.2-264.4 Compare Article 37.071, Vernon's Ann. Code of Criminal Procedure.

The probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society is one of the listed Oklahoma aggravating factors, but the statute, unlike that of Texas, requires that the jury be instructed to weigh any mitigating evidence against the aggravating circumstances. Okla. Stat., Title 21, § 701.12(7).

Psychiatric testimony is admissible in capital sentencing in Oklahoma and this Court rejected death where mitigating psychiatric testimony was not considered as a matter of law, *Eddings* v. *Oklahoma*, ___U.S. ___, 71 L.Ed.2d 1 (1982), quoting from *Lockett* v. *Ohio*, 438 U.S. 586 (1978):

> "Beginning with *Furman*, the Court has attempted to provide standards for a constitutional death penalty that would serve both goals of measured, consistent application and fairness to the accused . . . Id. at 8 . . . and . . . in *Gregg*, supra, the plurality held that the danger of an arbitrary and capricious death penalty could be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance . . . (at 195).

The Washington death penalty statute, amended in 1981, has the prediction of future dangerousness as one of eight circumstances that the jury might consider in deciding *whether leniency is merited*. R.C.W.A. 10.95.070. Other factors are essentially the same as those enumerated in the Virginia statute. The court or jury, after hearing any evidence deemed probative, including hearsay, evidence of the defendant's background, prior criminal activity including pending charges is specifically instructed to weigh aggravation against mitigation in answering the general question:

> "Having in mind the crime of which the Defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" R.C.W.A. 10.95.040.

In Maryland, the sentencer must first find that one or more of ten aggravating circumstances exist, Article 27 § 413 and, if so, then the existence of any one of seven mitigating circumstances are considered.

One of the mitigating factors is whether "it is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society." Art. 27, § 412(7).

Any of the mitigating circumstances, found by a preponderance of the evidence, are weighed against the aggravating circumstances, and if the sentencer determines from a preponderance of the evidence, that the mitigating facts outweigh the aggravating facts, the sentence shall be life.

The Maryland statute requires that the sentencer specify the aggravating and mitigating circumstances found to exist and which one outweighs the other. The basis for the verdict must be specified.

Although psychiatric testimony would be admissible on the likelihood of future criminal activity that would constitute a continuing danger to society, its impact would be far less damaging than the same prediction under the Texas statute. The instruction to consider whether other mitigating factors exist, and the option to weigh the evidence, places this potentially prejudicial testimony in focus as *one* of the factors to be considered.

Idaho requires an inquiry into mitigating and aggravating circumstances in capital sentencing, and the court assesses punishment after making written findings setting forth any aggravating circumstances found, including "whether the defendant, by prior conduct or conduct in the commission of the murder at hand, has exhibited a propensity to commit murder which will probably constitute a continuing threat to society." Here, the propensity to commit murder is a much more specific circumstance than general acts of violence constituting a continuing threat to society found in the other statutes considering future dangerousness. I.C.A. § 192515.

At the sentencing, the court may appoint a psychiatrist or psychologist to examine the defendant if there is reason to believe the defendant's mental condition would be a factor in sentencing. (§§ 19.2522 and 19-2523) That examination must be controlled by this Court's ruling in *Estelle* v. *Smith*, supra.

Psychiatric testimony is admissible in Idaho, but it is specifically directed toward answering whether the defendant creates any risk of danger for the public, if at large. This qualifica-

tion would limit the danger of the Grigson-Holbrook type testimony, which is designed to eliminate the jury's consideration of a life sentence because of the potential danger to prison inmates and personnel.

The propensity to commit future murders, if determined by reliance on psychiatric testimony, still does not mandate death since the sentencing authority is required to set forth, in writing, mitigating and aggravating factors considered, and if the former outweighs the latter, the imposition of death would be unjust. The guidance exists for the sentencing authority and the reviewer of the sentencing process can determine the basis for the sentence. No such safeguards exist under the Texas procedure.

The other 34 death penalty states permit evidence of any matter deemed relevant to sentence, regardless of the ordinary application of the rules of evidence. In capital sentencing, the usual rules of procedure do not apply, so in each of these states, although the specific issue of whether the defendant would commit future acts of violence that would constitute a continuing threat to society may not be asked, the courts might admit psychiatric testimony to assist the sentencer in answering the ultimate issue.

Where there is no instruction that mitigating circumstances be weighed against aggravating circumstances, and the jury is not guided in what evidence to consider in mitigation, "the goals of measured, consistent application and fairness to the accused" announced by this Court in *Furman*, supra, are not met.

The California Supreme Court has specifically recognized the inherent unfairness of psychiatric predictions of future dangerousness and has prohibited such testimony. *People* v. *Murtishaw*, 631 P.2d 446 (1982).

There a psychopharmocologist testified at the penalty stage that Murtishaw would continue to be a violent and assaultive person in prison, reacting to frustration with physical aggression, and show the same type of homicidal tendencies that he

has shown in the past. The court reversed the death penalty reasoning that:

> "(1) expert predictions that persons will commit future acts of violence are unreliable and frequently erroneous;
>
> "(2) forecasts of future violence have little relevance to factors before a jury under their statute;
>
> "(3) such forecasts despite their reliability and doubtful relevance may be extremely prejudicial to the defendant." (Id. at 466).

The *Murtishaw* court had previously taken judicial notice of the many studies demonstrating the unreliability of predictions that violent behavior could be predicted over a long term. *People* v. *Burnick*, 14 Cal.3d 306 (1975). The court noted new studies reviewing the high percentage of false positives supporting the view that psychiatrists are generally inaccurate predictors, citing Cocozza & Steadman's, *The Failure of Psychiatric Predictions of Dangerousness: Clear and Convincing Evidence*, (1976) 29 Rutgers L. Rev. 1084; Monahan, *The Prediction and Control of Violent Behavior* (Hearings before the House Subcommittee on Domestic and International Planning (1978), among many others.

This Court has recognized that the death penalty is a qualitatively different kind of punishment and "because of that qualitative difference, there is a corresponding need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson* v. *North Carolina*, 428 U.S. 280, 305, (1976).

George Dix, in his article *The Death Penalty, 'Dangerousness,' Psychiatric Testimony and Professional Ethics*, 5 Am. J.Crim.L. 151, 212(1977) addressed that very issue:

> "[a]lthough the utilization of predictive testimony by mental health experts in death hearings does not differ in many ways from reliance upon it in other contexts, the unique severity of the penalty increases the importance of avoiding unjustified reliance upon predictions of 'dangerousness' " (at 212).

B. The Dangerousness Issue In Barefoot

The testimony of Grigson and Holbrook, elicited in response to a hypothetical question, constituted error of a constitutional magnitude violating petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States because: 1) The question was not hypothetical, but was a fact question calling for a diagnosis and expert opinion concerning Thomas A. Barefoot; 2) An expert's opinion is inadmissible where based on erroneously admitted evidence; 3) An expert's opinion is incompetent where no examination of the defendant is performed and the opinion is without scientific or technical support; 4) the question called for no psychiatric or psychological expert opinion; and, 5) the question was one in which the jurors who had heard the same evidence were competent to answer without the aid of "expert" testimony.

The unwarranted opinions of Grigson and Holbrook were unreliable. They invaded the province of the jury and in effect mandated the jury's affirmative answer to the future dangerousness issue. The data presented to the two psychiatrists was not hypothetical, it was factual, and had just been heard by the jury. It was clearly directed toward eliciting an opinion about the defendant on trial, not a hypothetical person. It was designed for the specific purpose of eliminating the jury's consideration of a life sentence. Such expert opinion given by a psychiatrist to a lay jury, has an impact that without doubt contributes to an affirmative answer to the dangerousness issue depriving a defendant of his right to have the jury determine the facts.

In *White* v. *Estelle*, ___ F.Supp. ___, [No. H-81-1661, December 30, 1982] (S.D.Tx. 1982), State's expert, Dr. Nottingham was asked:

> "Assume with me that a defendant named *Larry Wayne White* was on trial for a capital murder and had been found guilty of that capital murder and it was shown in the evidence—and you're assuming with me that the evidence is correct—that he was convicted in 1972 of assault and battery; convicted in '73 of assault and battery; convicted

> again in '73 of resisting arrest; convicted of committing a first-degree murder in the State of Florida which occurred February 22nd, 1977; and then convicted in the case on trial of committing another capital murder in the State of Texas. What would be your professional opinion concerning the question which you are familiar with on probability? (Id. at 1681)

Following Nottingham's affirmative answer that the "hypothetical" defendant would be a future danger, the State's psychologist, Jerome Brown, Ph.D, was questioned on the same facts and gave similar testimony, adding that White was hedonistic.

The court rejected the argument that sought to distinguish *White* from *Smith* on the basis that doctors were testifying about an hypothetical person, not White, and were not testifying about their psychiatric evaluation of him:

> "The doctors had previously interviewed the petitioner; they knew they were testifying at the sentencing hearing of Larry Wayne White. The facts of the hypotheticals were the facts of White's criminal history . . . In one hypothetical, Larry Wayne *White's name was used.* A hypothetical is not a hypothetical just because it is initiated by the word "assume" or "if" . . . The jurors were familiar with petitioner's criminal record. They could not miss the implication of the state's identification of the subject of the hypothetical as Larry Wayne White . . . it is clear that the jurors were incapable of distinguishing between the hypothetical and the case of petitioner before them." (Id. at 10)

The validity and acceptability of an expert opinion must depend on the reliability and validity of the facts upon which it is based. It is immaterial that the expert is not personally acquainted with the facts, so long as the *basis for the opinion is valid.* That certain facts are controverted does not affect the opinion. Counsel is free to cross examine the witness on a different set of assumptions. However, where there has been no personal examination of the individual, and the jury cannot distinguish between the "hypothetical" person and the defendant, the impact on the jury is not just possible, but probable. *White,* supra; *Clark* v. *State.*

The"hypothetical" used to elicit expert medical and psychiatric opinions, if not based upon psychiatric or psychological data within the area of expertise of the witness, is unreliable, inadmissible, prejudicial evidence that only distorts the jury's fact finding function. The trend in Texas is to bolster a common sense, lay jury issue with a cloak of medical expertise that confounds the jury with its impact, leading them to the inescapable conclusion that the answer to the future dangerousness issue must be yes, the punishment must be death because the expert has no doubt.

The Court in *Jurek*, supra, anticipated that the jury would weigh all relevant evidence. But where a medical expert testifies with certainty that the defendant will be a continuing threat to society, in or out of prison, no rebuttal or cross examination can diminish that impact.

Any testimony that Barefoot was married, had children, loved his family and they him, went to church, graduated from high school or had friends could not have rebutted the experts' conclusions that wherever Barefoot went he had a bad reputation, known in *one-tenth* of the United States. That Barefoot's mental, emotional or judgmental capacity was affected by drugs or other intoxicating substances could carry no weight where an expert informs the jury that the use of such substances is a sure sign of sociopathy, a hopelessly untreatable condition, particularly in Barefoot's case, rendering him dangerous forever unless executed.

Cross examination was and will always be futile where this "expertise" is admitted before a jury.

Grigson and Holbrook, both psychiatrists were called by the State for their expert opinion of the type of personality of Thomas A. Barefoot, the individual described in the "hypothetical" question.

The facts to be assumed true posed in the "hypothetical" question to the psychiatrists were from five sources: (1) inadmissible hearsay testimony elicited from police officers or prosecutors at the punishment hearing; (2) a recounting of

facts elicited at the guilt stage of the trial, embellished with conclusions, and speculation; (3) facts of the offense itself; (4) prior convictions, two felony and one misdemeanor drug offense; one felony weapons possession; one federal possession of unregistered weapons charge; and (5) a three count felony indictment pending in New Mexico.

Holbrook and Grigson, had not previously met or examined Barefoot, nor had they listened to the trial testimony or observed witnesses. They informed the jury that as doctors of psychiatry they were able to give an expert medical opinion, within a reasonable medical certainty about the personality of Thomas Barefoot and could, with the same reasonable medical certainty, predict whether he would commit acts of violence that would constitute a continuing threat to society. Their only requirement was they be given sufficient background *data*. (Holbrook, R. 2072; Grigson, R. 2110).

Gridson bolstered his own credentials by volunteering that psychiatrists are particularly capable of classifying personalities because of their education and experience where the average layman could not (R. 2111). Cf. *Jurek*, supra.

Holbrook claimed that expert psychiatric opinions from hypothetical data was more reliable than an opinion based on an extensive examination, personal history and familial history of an individual because it was more objective. Results of those personal examinations are self serving, according to Holbrook (R. 2094) Cf. A.P.A. Task Force Report; *Murtishaw*, supra, *Holloway*, supra. Holbrook amplified his expertise by telling the jury that he returned to work at the Texas Department of Corrections to confirm the accuracy of his prior predictions of future dangerousness of criminals (R. 2069-2070). Saying nothing more, he permitted the jury to infer that his predictions were indeed accurate. Both men professed to be expert in predicting future dangerousness (R. 2033, 2078).

The facts presented to both psychiatrists were essentially the same. Holbrook testified outside of the presence of the jury that the fact that charges were pending against Barefoot in

New Mexico for aggravated kidnapping and anal and vaginal intercourse with a female child under 13 years of age did not influence his opinion because it was an accusation, not a conviction. That information was not included in the hypothetical data to Holbrook. Since Grigson had no such qualms, it was included in the data presented to him in the presence of the jury.

The balance of the hypothetical can be summarized as follows: Barefoot either acquired or renewed a bad reputation as a peaceful and law abiding citizen in particular towns between the years 1969 and 1978. This hearsay, presented to the jury through law enforcement officers and prosecutors, was clearly based on personal contact with Barefoot. Barefoot's proper objection in and out of the presence of the jury, that the witnesses were in each instance incompetent to testify as to reputation or that the reputation evidence was too remote to be relevant was overruled.

Just prior to the psychiatric testimony, the reputation witnesses testified, assuring that the jury would know that Thomas A. Barefoot was the subject of the hypothetical.

Five prior convictions were included: two for possesion of weapons, three for drug related offenses. The prosecutor claimed Barefoot escaped from custody to "avoid prosecution" in New Mexico.

The question detailed facts from the guilt phase, much of it based upon the testimony of the accomplice witness, Robert Roberson, and included conclusions and speculation, not properly inferred from the evidence, such as: drug laws didn't deter Barefoot; and misstating the evidence, that Barefoot didn't work because he didn't want to, that instead, he manipulated others into providing for him (R. 2078); that Barefoot had no concern for the residential community in Harker Heights because he set fire to a club; that he specifically chose to shoot Levin in the brain; that he did nothing to help Levin after he shot him, point blank, without provocation; and, that leaving town without luggage was clearly a sign that he was not a regular traveler.

Barefoot had been employed but had been injured on the job (R. 1561). There was no other evidence regarding his job history other than he was unemployed for a two month period between June and August 1978.

These *data*, fleshed out considerably, were the basis from which the two psychiatrists gave their expert medical opinion that Barefoot was an untreatable, severe sociopath, whose existence created a future danger to all other humans. (Holbrook, R. 2065-2091; Grigson, R. 2107-1963). Prior to giving their expert opinions, both psychiatrists testified that they had sufficient data and facts to make a diagnosis of Barefoot's personality and to predict his future dangerousness, both to a reasonable medical certainty.

Barefoot objected in and out of the presence of the jury to the competency of the expert witnesses; that the assumed facts consisted of controverted facts; and that the facts included speculation and conclusions; that the hypothetical contained no mitigating facts; that the psychiatric opinions invaded the province of the jury to answer a legal question, the ultimate issue before the trial of fact (R. 2042, 2090, 2126).

Holbrook testified that the facts pointed to the inescapable conclusion that Thomas A. Barefoot was a criminal sociopath (R. 2097) that there was no treatment available (R. 2100); no likelihood that Barefoot would change for the better, but that the badness would only accelerate (R. 2100). Holbrook characterized Barefoot as having a bad reputation in *one-tenth* of the continental United States, *"that we know of"* (R. 2092, emphasis added). He described Barefoot as antisocial, rejecting normal society because the data given lacked facts of loyalty to religion, science, political science, church or family (R. 2092).

Holbrook also found significance in the fact that Barefoot had used an alias in Bell County, after his escape from the New Mexico jail. This showed that Barefoot tended to disregard the normal values of social life with this ascending scale, *maintaining anonymity*, and taking on an alias while at the same time, maintaining considerable mobility, and becoming so well

known that his reputation was common knowledge over a vast area of the United States.

The hypothetical question to Grigson, beginning, "Assuming that *Thomas A. Barefoot*" . . . (R.2110) could leave no doubt in the jury's mind that Grigson was not giving an objective opinion based on a set of hypothetical facts but was considering the diagnosis and predicting the future dangerousness of the defendant on trial. Grigson diagnosed Barefoot as a "fairly classical, typical, sociopathic personality (R. 2128). He explained to the jury that meant that this individual lacks a conscience "like most of *us* develop at an early age." (R. 2128, emphasis added). On a scale of one to ten, Barefoot was in the most severe category [of persons with a sociopathic personality] in fact, above ten (R. 2129). Grigson told the jury that there was nothing in medicine or psychiatry or in any other field that will in any way at all modify or change the severe sociopath. According to Grigson, after a sociopath has killed another human being, the only thing worse is killing many more (R. 2129). That Barefoot would be a danger to society, in the penitentiary or free, was not only probable, but according to Dr. Grigson was *100% absolutely certain.*

Grigson's outrageous prediction, to an absolute certainty, that Barefoot was a future danger to all persons could not have impacted the jury any less that the statement that a defendant was hedonistic, *White* v. *Estelle*, ____ F.Supp. ____ (No. H-81-1661) (S.D.Tex. 1982).

> ". . . a direct assertion by the psychologist that White was hedonistic had a great impact on the jury and was devastating to petitioner's efforts to be sentenced to life rather than death." (Id., at 12).

The American Psychiatric Association, *Task Force Report on the Role of Psychiatry in Sentencing*, drafted in 1982, stated:

> "The psychiatrist who is not careful can *mislead* the judge or jury into believing that a person has a major mental disease simply on the basis of a description of prior criminal behavior. Or a psychiatrist can mislead the court into believing that an individual is devoid of conscience on the

> basis of criminal acts alone . . . *Given our uncertainty about the implications of the finding, the diagnosis of sociopathy or antisocial personality disorder should not be used to justify or support predictions of future conduct.* There is no certainty in this area. *Adding the pejorative term "sociopathy" to the predictive equation without substantial explanation obfuscates the issue.* (Id. at 29, 30)

The Court's mandate in *Smith*, supra, required the Defendant's knowing and voluntary participation in a psychiatric examination that may result in the examiner testifying about future dangerousness. Barefoot didn't have the option of choosing whether to be examined, he was evaluated by remote control of the prosecution-based version of the facts, blessed with the objectivity of a pseudo-medical opinion.

"[A] hypothetical is not a hypothetical just because is is initiated by the word 'assume' or 'if' " *White*, supra, at 10. The inherent danger in psychiatric predictions of future dangerousness was clearly emphasized by the district judge in *White:*

> "This court has serious reservations about the use of psychiatric predictions based on hypotheticals and *doubts their validity when the doctor has had no previous contact with the defendant.* The prevailing view among psychiatrists and professional psychiatric associations, a view to which this Court subscribes, is that to the extent that long range dangerousness can be predicted (a view not accepted by the psychiatric community) an opinion as to an individual's future penchant for violence *which does not follow extensive examination and is not based on a great deal of complex and in-depth information, is not a professional, but a lay opinion . . . When this lay opinion is proffered by a witness bearing the title "Doctor," its impact on the jury is much greater than if it were not masquerading as something it is not."* (Id. at 16, emphasis added).

Texas is aware of the dangers in psychiatric predictions, stating in *Holloway*, supra:

> ". . . opinion testimony, like hearsay, is admissible because it is not based on facts capable of being proved by direct evidence . . . there is nothing to be gained by permitting a witness to proffer an opinion on a subject

> when any other person in the courtroom, any member of the jury, could form an opinion on the issue equally readily and with the same degree of logic as the witness . . ." (at 500).

The admissibility of expert testimony must first be properly determined by the trial court, it is not automatically a matter of "weight" to be determined by the jury. *Holloway*, supra; cf *Barefoot*, supra. An expert's opinion may be inadmissible if there is no evidence or technical or scientific support for it. *Winegartner* v. *State*, 505 S.W.2d 303 (Tex.Cr.App. 1974).

Bad reputation evidence, erroneously admitted and distorted in its presentation, as a basis for medical expert opinions, is inadmissible, incompetent, and unreliable under *Holloway*, supra.

Expert opinion evidence must be tested and limited by the same considerations as other evidence in determining its admissibility: whether its probative value outweighs its prejudicial potential. To be relevant, an expert's opinion must be based on reliable facts. That the expert medical opinion of appellant's future dangerousness was formed without ever examining appellant and on the basis of conversations with "people who knew appellant" was an opinion clearly based on hearsay, was unreliable and was incompetent evidence before a jury trying the ultimate issue to which the opinion relates. *Holloway*, supra, *Reed* v. *Barlow*, supra, *Zillender* v. *State*, 557 S.W.2d 515 (Tex.Cr.App. 1977).

Judge Learned Hand once described the hypothetical question as "the most horrific and grotesque when upon the fair face of justice" (New York Bar Association, Lectures on Legal Topics, 1921-1922). The Court has held that the death penalty may only be imposed after a fair presentation of all the available evidence. *Gardner* v. *Florida*, 430 U.S. 349 (1977); *Gregg* v. *Georgia*, 428 U.S. 153 (1976); see generally *Furman* v. *Georgia*, 408 U.S. 238 (1972). The fairness of the sentencing procedure is measured by the due process clause. *Gardner*, supra, at 358, *Zillender* v. *State*, 557 S.W.2d 515 (Tex.Cr.App. 1977).

Psychiatric testimony lends a mystique to the punishment hearing that surely misleads a jury to believe that such expert opinion is a necessary part of their determination. Judge D. L. Bazelon eloquently delineated the functions of the psychiatrist in the case of *Washington* v. *United States*, 440 F.2d 444 (1967):

> "The function of the psychiatrist is not to try to tell the jurors what verdict they should render but rather portray as fully and completely as possible the mental and emotional makeup of the defendant; how his emotional and intellectual processes work and how they affect his capacity to control his conduct both generally and in the specific situation surrounding the crime charged. They should portray the 'inner man' as best as they can without fanciful speculation.

In *Barefoot* v. *Texas*, supra, the Court of Criminal Appeals of Texas, with no voice raised in dissent, asserted that the use of expert testimony and the testimony of experts based upon hypothetical questions, is a matter of state law, and, under the peculiar Texas statutes, within the exclusive discretion of each individual trial judge, who may admit any evidence he deems relevant to sentence. In *Holloway*, supra, Texas obviously reconsidered such a claim. But *Barefoot*'s rule still stands.

Holloway's retrial in 1982 (Cause No. 64411, in the 124th District Court of Gregg County, Texas) resulted in death being again assessed using Grigson's evil predictions to assist the jury. The hypothetical, framed just as Barefoot's and based on the evidence of the offense itself led Grigson, to the inescapable conclusion that Holloway was 100% absolutely a continuing threat to society and would, without doubt commit future acts of violence. The global purview of the Texas punishment issue predicated upon a finding of future dangerousness, requires exclusion of this type of psychiatric predictions of future dangerousness as a matter of federal constitutional law.

Even if psychiatric predictions of future dangerousness based upon a *legitimate* psychiatric and medical examination be proper at the punishment stage of a capital trial, where these predictions are based, as here solely upon a hypothetical of the same evidence heard by the jury, embellished with the

prosecutor's conclusions, and are submitted to the jury in resolving the issue of future dangerousness, the punishment proceeding is distorted, the accused is denied a fair hearing by the fact finders, and the state is permitted to bolster its non-medical and non-psychiatric "evidence" with the gloss of medical expertise.

Grigson's flat prophecy that Barefoot "most certainly would" commit future criminal acts of violence that would constitute a continuing threat to society, and that the probability of such future conduct was "one hundred percent and absolute," within reasonable psychiatric certainty, was outright quackery and its chicanery went to the very heart of the discretionary sentencing process required by the Eighth and Fourteenth Amendments to the Constitution of the United States.

The evil of such predictions, at least by practitioners like Grigson and Holbrook, under the Texas capital punishment statutes, is that they eliminate the jury's need to consider mitigating evidence. There is no cure, according to these experts, for the criminal sociopath. He cannot even be confined in the Texas Department of Corrections for a term of life imprisonment lest he harm the "society" therein. The Court's assurances in *Jurek*, supra, are meaningless.

There is no room for the "criminal sociopath" category for consideration of the youth of the offender, the fact that he was under the influence of alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct. *Roberts* v. *Louisiana*, 431 U.S. 633, 637 (1977).

Equally immaterial is the fact that the offender was a party to but did not himself commit the murder. *Lockett* v. *Ohio*, 438 U.S. 585 (1978).

All of these mitigating circumstances are moot under the Grigson-Holbrook caveat that there is no known cure for the sociopath personality. What matters the age of the offender, his part in the crime, whether he was acting under duress or

was under the domination of another, whether he was under an extreme form of mental or emotional pressure, the fact that he was under the influence of drugs or alcohol, or the fact that he reasonably believed in the existence of circumstances which provided a moral justification for his conduct? Even if all these facts be true, if he is a sociopath, he must die.

The Grigson-Holbrook prophecies carefully eliminate the jury's need to consider life imprisonment for the offender. He will be a danger to the inmates and personnel of the Texas Department of Corrections. This all adds up to a mandatory affirmative answer to the second punishment issue and a mandatory sentence of death for the offender.

It can thus be seen that the reliability of such opinions goes to the very heart of the punishment proceedings in Texas capital murder trials.

A majority of this Court swept aside a state procedural rule which excluded relevant and reliable mitigating evidence at the punishment proceeding, holding that such exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. *Green* v. *Georgia*, 442 U.S. 95 (1979).

The harm is just as great to a convicted capital offender where the statute permits the admission of potentially unreliable and bolstering aggravating evidence at the punishment proceedings. Cf. *Gardner* v. *Florida*, 430 U.S. 349 (1977).

In *Gardner*, three members of this Court agreed that the sentencing process of a capital trial must satisfy the requirements of the Due Process Clause and that sentencing is a critical stage of a capital criminal proceeding at which the defendant is entitled to the effective assistance of counsel.

As Mr. Justice Stevens noted in *Gardner:*

> ". . .[F]ive Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." and: "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be based on reason rather than caprice or emotion." 430 U.S. at 357-358.

Both psychiatrists in Barefoot's case reached their standard boilerplate pseudo-psychiatric conclusions upon non-medical and non-psychiatric facts. A person's reputation for being a peaceful and law abiding citizen in various communities appears to have little or no medical or psychiatric significance. It may be a social commentary upon those who testify about such "reputation," however. Doubtless the late Doctor Martin Luther King had such a reputation over a wider geographic range than did Barefoot in the same circles that established Barefoot's reputation.

Substantive due process of law at the penalty stage of a capital murder trial, requires the rejection of such testimony. "Jury errors in assessing the credibility of this type of evidence creates a significant risk of inaccurate imposition of the death sentence, and of the perversion of the entire discretionary sentencing process mandated by the eighth and fourteenth amendments." Dix, *Expert Prediction Testimony in Capital Sentencing*, 19 Am.Crim.L.Rev., 1-48, at 48 (1981).

The Texas Legislature framed the ultimate issue regarding future dangerousness as a fact question to be determined by a jury beyond a reasonable doubt, not a reasonable psychiatric certainty, calling for psychiatric testimony. Where medical experts assert that such a probability exists and is 100% certain and absolute, no rebuttal can touch that impact on a jury. The hypothetical truly, in this instance is the most "horrific and grotesque," requiring Barefoot's death sentence be vacated.

This Court's demand for due process and a rational, not capricious decision in assessing death, has provided insulating safeguards in assessing the penalty different from all others. The unique decision to exterminate a citizen must be reached only after a careful, reasoned and fair weighing of reliable, credible evidence. Before a jury can impose a sentence reached by the inescapable conclusion that another human's life cannot be spared, justice demands that the conclusion not be impacted by quackery "masquerading as something it is not." *White*, supra.

There is no doubt that there is a reasonable possibility the testimony of Grigson and Holbrook contributed to the jury's verdict in the punishment phase of Barefoot's trial. *Clark*, supra.

Petitioner's sentencing hearing did not satisfy the due process requirements of the United States Constitution. He was deprived of the effectiveness assistance of counsel because the nature of the psychiatric testimony elicited could not be rebutted and in no way could its impact be diffused. The Grigson-Holbrook testimony removed all jury discretion in considering mitigation contrary to the provisions of the Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. Petitioner's death sentence must be vacated.

CONCLUSION

The Court of appeals applied an erroneous standard in denying petitioner's application to stay the execution of his death sentence. Neither the decisions of this Court nor the applicable habeas corpus statutes and rules implementing them require a threshhold showing by an appellant of a likelihood that he will prevail on the merits.

This Court has indicated that the most that can be required is a demonstration that the appeal is not frivolous. Some of the circuit courts have broadened this test to require the showing of a "substantial federal issue," but even these holdings conflict with the last word from this Court in *Garrison* v. *Patterson*, supra, and the cases there cited. As to petitioner's second issue, the use of the Grigson-Holbrook boilerplate testimony distorts the penalty determination of the jury and deprived the petitioner of a fair trial of the punishment issue. Petitioner Thomas A. Barefoot prays that this Court set aside the ruling of the Court below and either (1) determine the validity of the constitutional issues raised by the State's use of purported hypothetical psychiatric testimony at the punishment hearing in this Texas capital murder trials, or (2) rule that under the facts of this case, the petitioner was denied due process and equal protection of the law, the effective assistance of counsel

and a fair determination by the jury of the punishment to be assessed in his case. In the alternative, the petitioner prays that this cause be remanded to the court below for the appeal to which petitioner was entitled in the first place.

Respectfully submitted

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. It also involves the following Federal Statutes and rules, and state statutes:

a. 28 United States Code, Section 2253.

"In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding was had . . .

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause."

b. 28 United States Code, Section 2251.

"A justice or judge of the United States before whom a habeas corpus proceeding is pending, may, before final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding.

"After the granting of such a stay, any such proceeding in any State court or by or under the authority of any State shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings or appeal were pending."

c. 28 United States Code, Section 1915(a).

"[A]n appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith."

d. Rule 22(b), Federal Rules of Appellate Procedure.

"In a habeas corpus proceeding in which the detention complained of arises out of process issued by a state court, an appeal by the applicant for the writ may not proceed unless a district or a circuit judge issues a certificate of probable cause. If an appeal is taken by the applicant, the district judge who rendered the judgment shall either issue a certificate of probable cause or state the reasons why such a certificate should not issue. The certificate or the statement shall be forwarded to the court of appeals with the notice of appeal and file of the proceedings in the district court. If the district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge. If such a request is addressed to the court of appeals, it shall be deemed addressed to the judges as the court deems appropriate. If no express request for a certificate is filed, the notice of appeal shall be deemed to constitute a request addressed to the judges of the court of appeals. . . .

e. Rule 8, Federal Rules of Appellate Procedure.

"(a) Stay must Ordinarily be Sought in the First Instance in the District Court; Motion for Stay in Court of Appeals.

"Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. A motion for such relief may be made to the court of appeals or to a judge thereof, but the motion shall show that application to the district court for the relief sought is not practicable or that the district court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the district court for its action. The motion shall also show the reason for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements of copies thereof. With the motion shall be filed such parts of the record as are relevant. Reasonable notice of the motion shall be given to all parties. The motion shall be filed with the clerk and normally will be considered by a

panel or division of the court, but in exceptional cases where such procedure would be impracticable due to the requirements of time, the application may be made to and considered by a single judge of the court . . ."

f. Article 37.071, VERNON's ANNOTATED CODE OF CRIMINAL PROCEDURE

"(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

"(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

"(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

"(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society;

". . .

"(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of 'yes' or 'no' on each issue submitted.